



# Office of the People's Counsel District of Columbia

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Elizabeth A. Noël  
People's Counsel

October 21, 1996

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 222  
Washington, D.C. 20554

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OCT 21 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: Petition for Reconsideration in CC Docket Nos. 96-128 and 91-35  
(Report and Order, September 20, 1996, - FCC 96-388)

Dear Mr. Caton:

Enclosed for filing in the above-referenced docket, please find an original and fourteen (14) copies of the Office of the People's Counsel for the District of Columbia's Petition for Reconsideration.

Please contact the undersigned if there are any question or comments.

Respectfully submitted,

Michael A. McRae  
Assistant People's Counsel

Enclosure

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**OCT 21 1996**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	CC Docket No. 91-35
Operator Service Access and	)	
Pay Telephone Compensation	)	
	)	
Petition of the Public Telephone Council	)	
To Treat Bell Operating Company	)	
Payphones as Customer Premises	)	
Equipment	)	
	)	
Petition of Oncor Communications	)	
Requesting Compensation for	)	
Competitive Payphone Premises	)	
Owners and Presubscribed Operator	)	
Services Providers	)	
	)	
Petition of the California Payphone	)	
Association to Amend and Clarify Section	)	
68.2(a) of the Commission's Rules	)	
	)	
Amendment of Section 69.2(m)	)	
and (ee) of the Commission's Rules	)	
to Include Independent Public	)	
Payphones Within the "Public	)	
Telephone" Exemption from End User	)	
Common Line Access Charges	)	

**OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA'S  
PETITION FOR RECONSIDERATION**

**SUMMARY**

The Office of the People's Counsel for the District of Columbia (OPC-DC) specifically addresses paragraphs 55 through 62 of the Report and Order in its Petition for Reconsideration.

OPC-DC submits that the FCC's decision to preempt state regulation of local coin calling is not required by the Telecommunications Act of 1996 and improperly intrudes on the states' regulation of a purely intrastate matter. Because local coin rates are not competitive, OPC-DC submits that the FCC's action will likely result in increased coin calling rates, thus harming consumers without competitive options. OPC-DC respectfully asks the FCC to reconsider and reverse this portion of its Report and Order by adopting rules that would require the states to comply with Section 276 of the 1996 Act without preempting states' jurisdiction over local coin calls and rates.

## **I. Introduction**

The Office of the People's Counsel for the District of Columbia (OPC-DC) respectfully submits its "Petition for Reconsideration" of the Federal Communications Commission's ("FCC" or "Commission") Report and Order (96-388) released on September 20, 1996 in the instant docket.<sup>1</sup> OPC-DC, an independent agency of the District of Columbia government, is statutorily mandated to represent the interests of the District's public utility consumers and ratepayers before federal and state agencies and courts.<sup>2</sup>

In its Petition, OPC-DC specifically addresses paragraphs 55 through 62 of the Report and Order in which the Commission concludes that notwithstanding traditional state<sup>3</sup> regulation in this area, local coin calls should be deregulated. OPC-DC submits that the FCC's decision to preempt

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<sup>1</sup> OPC-DC's Petition is filed pursuant to 47 C.F.R. § 106 (1995) and Report and Order at para. 300. Because of extremely limited resources during the comment period, OPC-DC was unable to prepare and file initial or reply comments. The matters raised in the Report and Order, however, will directly affect and are of great significance to District of Columbia consumers.

<sup>2</sup> D.C. Code Ann. § 43-406 (1981).

<sup>3</sup> References in this Petition to the term "state" include the District of Columbia. *See* 47 U.S.C. § 152(40).

state regulation of local coin calling is not required by the Telecommunications Act of 1996 ("1996 Act"). Moreover, the FCC's decision on this matter improperly intrudes on the states' regulation of purely intrastate matters. OPC-DC submits that the FCC's action will directly harm District of Columbia telephone consumers, as well as consumers nationwide, by deregulating the price for a local call, which is a monopoly service in every jurisdiction.<sup>4</sup> Because competition is not present in the payphone market, it is likely that coin calling rates will significantly increase, thus harming consumers without competitive options. OPC-DC submits, therefore, that the FCC should reconsider and reverse this portion of its Report and Order by adopting rules that would require the states to comply with Section 276 of the 1996 Act without preempting states' jurisdiction over local coin calls and rates.

## **II. Background**

In the 1996 Act, Congress, *inter alia*, required the FCC to prescribe rules that ensure the Bell operating companies do not subsidize its payphone operations from its telephone exchange service operations and to ensure payphone service providers ("PSP") are fairly compensated for completed calls.<sup>5</sup> In response to the statutory directives, the Commission issued a Notice of Proposed Rulemaking on June 4, 1996 to solicit comments from interested parties on these and other issues

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<sup>4</sup> The District of Columbia Public Service Commission ("DC-PSC") regulates the rates for local calls at public pay telephones in the District of Columbia. *See generally* PSC-DC, Formal Case No. 829, In the Matter of the Adoption of Tariffs for the Provision of Coin Operated Telephone Service in the District of Columbia. The approved local coin rate for Bell Atlantic - Washington, D.C., Inc. ("BA-DC") operated pay telephones is 25 cents per call. The charge for local calls made at pay telephones operated by PSPs "shall not be more than the rate charged by [BA-DC] to users of its public coin-operated telephones." 15 D.C.M.R. § 602.3 (1993).

<sup>5</sup> 47 U.S.C. § 276.

related to the regulation of pay telephones.<sup>6</sup> Comments and reply comments were filed by a number of parties.

In its Report and Order, the Commission concludes that "full and unfettered competition is the best way of achieving Congress' dual objectives to promote 'competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.'" <sup>7</sup> The Commission then concludes that "a deregulatory, market-based approach to setting local coin rates is appropriate, because existing local coin rates are not necessarily fairly compensatory."<sup>8</sup> From April 15, 1997, the date upon which LECs are required to terminate certain subsidies associated with payphones, and for one year following, states will be responsible for ensuring the PSPs are fairly compensated for local coin calls and protecting consumers from excessive rates.<sup>9</sup> After April 15, 1998, the local coin rate will be deregulated and left to local market conditions.<sup>10</sup>

The Commission, however, did provide for an exception by states that were able to demonstrate that due to market failure within a state, market-based rates were not possible. According to the FCC, to meet such a burden, a state could provide a record of a state proceeding that "examines the costs of providing payphone service within that state and the reasons why the

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<sup>6</sup> 11 FCC Rcd 6716 (1996).

<sup>7</sup> Report and Order para. 55 *citing* 47 U.S.C. § 276(b)(1).

<sup>8</sup> Report and Order, para. 58.

<sup>9</sup> *Id.* para. 60.

<sup>10</sup> *Id.* para. 61.

public interest is served by allowing state to continue to set rates within the market.<sup>11</sup> Finally, the Commission concludes that to ensure fair compensation for "411" directory assistance calls, the PSP should be allowed to charge a market-based rate for those calls, although the PSP could voluntarily decline to impose such a charge.<sup>12</sup>

### **III. Basis for Reconsideration**

#### **A. The FCC Decision to Deregulate Local Coin Calling Is Not Required by the 1996 Act and It Improperly Intrudes Upon the States' Ability to Regulate a Purely Intrastate Matter.**

OPC-DC submits that the FCC exceeded its jurisdiction by ordering the deregulation of local coin rate calling. The 1996 Act does not require or authorize such action by the FCC. It is beyond dispute that local coin calling is intrastate in nature, and, as such, has historically been regulated by the states.<sup>13</sup> Local coin calling is, in fact, subsumed with the concept of basic local exchange calling. First, and most significantly, Congress, in passing the 1996 Act, did not overrule Section 152(b) which carefully delineates the scope of FCC jurisdiction. Section 152(b) provides that "nothing in [the Communications Act of 1934] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier. . . ."<sup>14</sup> This section is controlling and should prohibit the FCC's preemption of local coin calling. Second, the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* para. 62.

<sup>13</sup> The FCC acknowledges that "states have long had a traditional and primary role in regulating payphones, including setting local rates paid by end users." Report and Order para. 58 *citing* NPRM at paras. 20-22.

<sup>14</sup> 47 U.S.C. § 152(b) (emphasis added).

1996 Act specifically recognizes and maintains the states' ability to impose regulations to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."<sup>15</sup> Finally, while Section 276 requires the Commission to prescribe regulations to ensure fair compensation for PSPs for completed interstate and intrastate calls, it does not suggest or imply that the appropriate means to effectuate this goal is to preempt state regulation over a traditionally intrastate matter.<sup>16</sup>

OPC-DC submits that the FCC far exceeded the necessary action to fulfill its statutory mandate. The record in this proceeding provided support for appropriate and a much less intrusive mechanism to ensure compliance with the 1996 Act. The Public Utilities Commission of Ohio, for example, proposed a "dual regulatory approach which better promotes the cooperative regulatory paradigm envisioned by Congress in passing the 1996 Act."<sup>17</sup> Moreover, the Commission did not provide legal or policy support for the necessity to preempt state regulation over local coin calling. The FCC did not explain why less intrusive federal regulation over a traditional state area of regulation would not allow the Commission to fulfill its section 276 responsibilities.

Even if the FCC were permitted by law to preempt state regulation over local coin calling,

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<sup>15</sup> 47 U.S.C. § 253(b).

<sup>16</sup> In National Ass'n of Reg. Util. Comm'rs v. FCC, No. 86-1678, slip op. (D.C. Cir. 1989), the D.C. Circuit explained that the FCC may preempt state regulation only "when the state's exercise of [its] authority negates the exercise by the FCC of its own lawful authority over interstate communication." Slip op. at 15. The FCC's preemption order regarding inside wire was remanded because the FCC failed to satisfy its burden of showing that the state regulations it sought to preempt would in fact "necessarily thwart [the FCC's legitimate objective] . . . of a free and competitive inside wire market." Slip op. at 19. Similarly, in the instant case, the FCC did not establish how state regulation over local coin rate calling would "necessarily thwart" the development of a competitive pay telephone market.

<sup>17</sup> Public Utilities Commission of Ohio comments at 3.

such a decision sets less than optimal public policy. The states, not the FCC, are best positioned to address the local issues raised by intrastate public pay telephone calling. For example, in the District of Columbia, the rates for local coin calls are set by the D.C. Public Service Commission ("DC-PSC") after litigated proceedings. In establishing the local calling rate, the DC-PSC must affirmatively determine whether the cost data supports the proposed rate. In addition, certain non-rate factors, like local subscribership rates, impact on the setting of the local coin rate must be considered. For example, in the early 1990s, when the District of Columbia subscribership rate dipped below 90%, OPC-DC aggressively fought a Bell Atlantic proposal to raise the local coin rate to 35 cents a call from 20 cents.<sup>18</sup> OPC argued that because those without access to telephone service in the home substantially rely on pay phone service, a significant rise in the local coin rate would further limit the ability of these consumers to access the public switched network. Obviously such a result would not be in the public interest. As representative of telephone consumers in the District of Columbia, OPC-DC is concerned that deregulating local coin rate would result in dramatically higher yet unjustified rates that would be contrary to the public interest and would harm District ratepayers and consumers nationwide.

**B. The FCC's Report and Order is Based on the Faulty Presumption that Local Coin Calling is Competitive**

OPC-DC agrees with the FCC that "full and unfettered competition" is the best way to effectuate Congress' goal regarding the widespread deployment of payphones. OPC-DC, however,

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<sup>18</sup> PSC-DC, Formal Case No. 926, In the matter of the Application of the Chesapeake and Potomac Telephone Company for Authority to Establish A Revenue Requirement and To Increase And Restructure Its Schedule of Rates and Charges, Opinion and Order, Order No. 10353 at 164-169 (Dec. 21, 1993).



believes that regulatory structure proposed by the FCC is not the appropriate manner in which to accomplish this goal. The FCC's approach is premised on the assumption that competition is present today in this market. OPC-DC submits that this is not the case in any area in the United States. Specifically, in the District of Columbia, local coin rate is not competitive. After a number of years of litigation, the DC-PSC approved in 1993, a pricing mechanism to allow Bell Atlantic to flexibly price its "competitive" services and criteria for determining whether local services were competitive.<sup>19</sup> Although Bell Atlantic - Washington, D.C., Inc. (BA-DC) has successfully petitioned to have many of its services classified as competitive, it has never petitioned to classify local coin calling as competitive. In fact, in a proposed settlement of a BA-DC petition for price cap regulation, BA-DC, OPC-DC and other settling parties agreed to have local coin rate classified as "basic" rather than either "discretionary" or "competitive."<sup>20</sup>

In addition, OPC-DC testified in other cases before the DC-PSC that local payphones are competitive only to the extent that competition exists for locations, not for rates.<sup>21</sup> For example, pay phone service providers may compete to obtain a contract for a lucrative location (e.g., Metrorail

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<sup>19</sup> See PSC-DC Formal Case No. 814, Phase III, In the Matter of Investigation Into The Impact of the AT&T Divestiture and Decisions of the Federal Communications Commission on the Chesapeake and Potomac Telephone Company's Jurisdictional Rates, Order No. 10147 (Jan. 24, 1993).

<sup>20</sup> See PSC-DC Formal Case No. 814, Phase IV, In the Matter of Investigation Into The Impact of the AT&T Divestiture and Decisions of the Federal Communications Commission on the Chesapeake and Potomac Telephone Company's Jurisdictional Rates, Second Revised Non-Unanimous Full Settlement Agreement (filed Aug. 30, 1996).

<sup>21</sup> Although the incumbent local exchange carriers currently have approximately 81% of all payphones in the country, and BA-DC has the overwhelming majority of payphones in the District of Columbia, the nature of any competition present is for location. Maintaining state regulation over the local coin rate, however, is a distinct issue and the focus of OPC-DC's comments in this Petition.

stations), but the local coin calling itself is not competitive. Yet, OPC-DC submits the local coin rate is not competitive. If the market were competitive, OPC-DC believes that a PSP would charge a rate less than the 25 cent cap.<sup>22</sup> OPC-DC is not aware of any District of Columbia payphone that charges a rate other than 25 cents.

The FCC exception allowing states to demonstrate that market failures would not allow market-based rates<sup>23</sup> are insufficient and should not be viewed as justification for federal preemption in this area. This exception mechanism maintains an inappropriate presumption that the market is competitive, and inappropriately shifts the burden to the states to rebut that presumption. In addition, the standard for demonstrating market failure is exceptionally vague.

For the FCC to broadly presume that local calling rate is competitive vitiates years of work in the District of Columbia to develop regulations that would promote competition, yet would protect ratepayers of services that remained monopolistic. Deregulation of not yet competitive markets will only harm the most vulnerable of customers, those with few or no competitive options.

**C. The FCC Could Fulfill Its Statutory Responsibilities Under Section 276 Without Preempting State Regulation of Local Coin Calling.**

OPC-DC further submits that the Commission could fulfill its statutory responsibilities by promulgating general rules, but allowing the states to maintain primary responsibility to regulate.<sup>24</sup>

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<sup>22</sup> See footnote 4 *supra*.

<sup>23</sup> Report and Order at para. 61.

<sup>24</sup> This approach is equally applicable to preemption of state regulation of the coin "411" directory assistance rate. If the FCC established rules that specifically required the states to comply with the provisions of section 276, including the "fair compensation" provision, states could continue to regulate the coin directory assistance rate. Although modification of the directory assistance rate may be required in some states after the requirements of Section 276 are fully examined by the state commission, the state would retain the authority to approve a directory rate as long as it is consistent

For example, states could ensure that Bell operating companies do not subsidize payphone service from its telephone exchange service and ensure that PSPs are fairly compensated for each intrastate call. Under this approach, the FCC would still have the ability to take action if it were demonstrated that a state's decision contravened the 1996 Act. This approach would properly permit the states to take into account regional and local factors when addressing these issues.

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with Section 276. This approach would allow jurisdictions to take into account factor unique to their own state, while ensuring compliance with the 1996 Act. Retaining state regulatory authority in this area is especially important in the District of Columbia where there is currently no charge for a coin directory assistance call. OPC-DC submits that consumers may receive inadequate protection if so-called market-based, deregulatory, pricing is implemented.

#### **IV. Conclusion**

For the above-stated reasons, OPC-DC submits that the FCC should reconsider its decision with respect to paragraphs 55-62 of its Report and Order.

Respectfully submitted,

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